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BALCA Case No.: 2019-TLC-00073

ETA Case No.: H-300-19184-594091

In the Matter of:

INTERGROW EAST, INC.

Employer

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Leonard J. D'Arrigo, Esq.
For Employer

Rebecca Nielson, Esq.
Tamara Hoflejzer, Esq.
Office of the Solicitor
Washington, D.C.

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

**DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION**

This case originates under the temporary agricultural guest worker provisions of the Immigration and Nationality Act (INA),¹ and the implementing regulations.² This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

On 1 Aug 19, Employer requested de novo review of the Certifying Officer's (CO) 29 Jul 19 denial of Employer's H-2A Application for Temporary Employment Certification. The Office of Administrative Law Judges received the request on 8 Aug 19. The CO compiled and forwarded the administrative file (AF), which I received on 16 Aug 19. During an initial telephone conference with both counsel on 19 Aug 19, Employer waived a formal hearing in lieu of submission of exhibits for a decision on the record. Employer offered the attachments to its request for de novo hearing, and the Solicitor was given 10 days in which to either file objections

¹ 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188.

² 20 C.F.R. Part 655, Subpart B (collectively, the H-2A program).

or a brief. The Solicitor did not object to Employer’s exhibits. On 29 Aug 19, the Solicitor filed its brief. Employer waived any further response, relying solely on its original submissions on review. Having considered the evidence contained in the administrative file, the evidence and arguments presented by the parties, and the applicable laws and regulations, the Certifying Officer’s denial of Employer’s H-2A Application for Temporary Employment Certification is **AFFIRMED**.

BACKGROUND

Employer is a greenhouse facility tomato producer in upstate New York, providing customers with year-round, local tomatoes.³ It sought certification of 15 farmworkers and laborers, Crop, Nursery, and Greenhouse.⁴ It categorized its request as “seasonal,” requesting the workers from 1 Sep 19 through 30 Jun 20. On 10 Jul 19, the CO found the Employer failed to demonstrate a temporary or seasonal need as required by 20 C.F.R. § 655.103(d).⁵ The CO also required Employer to explain the change in its period of need, as it had previously been certified from November 2018-June 2019.⁶

However, the primary dispute for adjudication relates to the CO’s concerns about Employer’s relationship to another entity, Intergrow Greenhouses, Inc., which had been previously certified with alternate dates of needs. Dirk Biemans, Intergrow East’s president, had an extensive H-2A filing history as a principal with “Intergrow Greenhouses, Inc.”⁷ The following chart summarizes the past two years’ applications:

Case No.	Employer	Status	Begin	End	Worksite	Housing	# of workers
H-300-17303-483725	Intergrow Greenhouses, Inc.	Certified – full	2 Jan 18	31 Oct 18	2428 Oak Orchard Rd., Albion, NY	119 West Park St., Albion, NY	53
H-300-18267-519929	Intergrow East, Inc.	Certified – full	20 Nov 18	30 Jun 19	493 Timothy Ln., Ontario, NY	119 West Park St., Albion, NY	12
H-300-18260-647198	Intergrow Greenhouses, Inc.	Certified – full	2 Jan 19	31 Oct 19	2428 Oak Orchard Rd., Albion, NY	119 West Park St., Albion, NY	45
H-300-19184-594091	Intergrow East, Inc.	Pending	1 Sep 19	30 Jun 20	493 Timothy Ln., Ontario, NY	119 West Park St., Albion, NY	15

The CO noted a number of commonalities between the entities:

- Biemans, the top executive and point of contact for both entities, had filed numerous applications with Intergrow Greenhouses and more recent filings with Intergrow East;

³ Employer’s Brief, p.3.

⁴ AF 653-663.

⁵ A second issue was resolved and is not a part of this appeal.

⁶ AF 642.

⁷ AF 642-44; 679-82.

- their applications requested workers to:
 - perform the same (or extremely similar) job duties,
 - under the same Standard Occupational Classification (SOC) code,
 - in jobs that required no experience, no minimum education, and a 5-day training period;
- the worksites are about an hour apart in upstate New York;
- they share common ownership, management, coordination, and worker housing facilities

If the two entities are viewed as a single employer, there has only been a 20 day gap in Employer's need for temporary labor over the last two and a half years.

The CO determined that the two entities were so interconnected as to constitute a single employer, requiring their dates of need to be combined, which results in a period of need exceeding the one-year maximum for temporary employment, and disqualifies the employer from the H-2A program for purposes of that particular job opportunity.⁸

Employer's Response to the Notice of Deficiency

On 15 Jul 19, Employer responded with letters of explanation and supporting documentation.⁹ It proposed that, while the two greenhouse operations were similar, they were distinct entities. It agreed both entities shared sales, accounting, and Human Resources managers, which give general direction to each entity. It noted, however, that each of the two entities sells a different variant of tomato; has its own management team and personnel; has areas designated for employees, office work, growing, and packing; and each crop has its own unique crop cycle with its own temporary/seasonal labor need. It explained that the different crop cycles allow it to produce tomatoes year round.¹⁰

Employer revealed that the season it established in its previous application had changed because the greenhouse completed construction during that first season in 2018.¹¹ Employer included payroll reports for both entities; certificates of incorporation for both entities as well as their parent company, Intergrow Holding Co.;¹² an organizational chart for Intergrow Holdings, Co.; job responsibilities for various positions; and written responses to questions asked in the Notice of Deficiency.¹³

The differences the employer noted include that the payroll reports show different employees are at each facility. Employer noted that both facilities have their own greenhouse manager, greenhouse supervisor, packhouse manager, and facility manager. These individuals are responsible for labor planning, labor efficiency, hiring and firing employees, disciplinary actions, scheduling, and facility maintenance. Each has its own payroll and insurance program. Each entity grows its own variant of tomato that has a distinct growing cycle. Personnel do not

⁸ AF 642-44.

⁹ AF 94-639.

¹⁰ AF 540.

¹¹ *Id.*

¹² These show Biemans is the President of Intergrow East and Director of Intergrow Holding Co. AF 516, 531.

¹³ AF 94-512; 515-38; 540-639.

generally move freely between the two entities. Each entity has its own bank accounts and funds. HR materials contain certain site specific items.

The similarities conceded by Employer include that, for both entities, Biemans is the president, has the authority to submit H-2A applications, drives strategic management, and is responsible for obtaining payroll and insurance services. All funds are controlled by a shared accounting manager. Common HR materials are used by both entities, and they share an HR manager. Both grow tomatoes sold under the Intergrow label, and the job duties are similar. There is some overlap in the growing cycles because of the length of the cycles. Of the three housing facilities for temporary workers in use by Intergrow Greenhouses, Inc., one is shared housing with Intergrow East. Some employees have been transferred from one entity to the other for growth and development opportunities.

The CO's Final Determination

On 29 Jul 19, the CO denied Employer's application, having determined that both entities are a single employer for purposes of the H-2A program and their combined dates of need reflect a year-round need for labor. The basis for that decision was that Employer failed to demonstrate its need is temporary or seasonal in nature. The CO supported its position noting common ownership, common management, interrelated operations, and centralized control of personnel practices for the entities.

Request for De Novo Hearing¹⁴

On 1 Aug 19, Employer submitted a request for a de novo hearing. It maintained that the CO applied the "single employer test" erroneously, and highlighted the entities' separate worksites, FEINs, number of requested workers, management teams, crop variants and cycles, and bank accounts. It attached photographs of Intergrow East, Project Site Plans for each entity, separate bank account statements for each entity, evidence of each entity's unemployment and workers compensation insurances, packing reports for each entity, and an organizational chart showing that each entity has a separate management team. It also highlighted nuances in job duties and SOC codes in the applications for each entity.

LAW

To fulfill the Secretary of Labor's H-2A responsibilities under the INA, the Secretary promulgated rules in 20 C.F.R. Part 655, Subpart B, governing the labor certification process for temporary agricultural employment in the United States. Among the provisions relevant here are (emphasis added below):

§ 655.103(d) Definition of a temporary or seasonal nature.

For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for

¹⁴ AF 1-76.

ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last *no longer than 1 year*.

§ 655.161(a) Criteria for certification.

The criteria for certification include whether the employer has established the need for the agricultural services or labor to be performed *on a temporary or seasonal basis*; complied with the requirements of parts 653 and 654 of this chapter; complied with all of this subpart, including but not limited to the timeliness requirements in § 655.130(b); complied with the offered wage rate criteria in § 655.120; made all the assurances in § 655.135; and met all the recruitment obligations required by § 655.121 and § 655.152.

The relevant inquiry is not whether the job itself is temporary, but whether the Employer has established that its *need* for labor is of a temporary or seasonal nature.¹⁵

An employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application¹⁶ and cannot continually shift its period of need in order to utilize the H-2A program to fill a permanent need.¹⁷

An employer that has its operations divided among nominally different entities is not relieved of the requirement to show seasonal or temporary need. Therefore, if two legally distinct companies are so interlocking that they essentially function as the same business entity, they will be considered one employer and their dates of need will be combined when assessing whether the employer's needs are temporary.¹⁸ It is employer's burden to demonstrate that it and another business entity are truly independent entities.¹⁹

The single-employer test, developed under the National Labor Relations Act, is widely used in labor and employment law to determine whether two entities are truly independent of each other. This test involves a fact-intensive consideration of four key factors, none of which is singularly

¹⁵ *Cressler Ranch Trucking LLC*, 2013-TLC-7 (26 Nov 12).

¹⁶ *Katie Hieger*, 2014-TLC-1 (12 Nov 13); *Lancaster Truck Line*, 2014-TLC-4 (26 Nov 13). *Altendorf Transportation*, 2013-TLC-32 (28 Mar 13); *Haas Farms*, 2016-TLC-32 (7 Apr 16); *Legume Matrix, LLC* 2016-TLC-8 (8 Dec 15); *Russel Alan Gramlow*, 2016-PER-71 (26 Aug 16); *Sugar Loaf Cattle Co., LLC*, 2016-TLC-33 (6 Apr 16) (using principles developed under NLRA to determine if two companies so intertwined as to constitute single employer).

¹⁷ *Salt Wells Cattle Co.*, 2010-TLC-134 (29 Sep 10).

¹⁸ See *Katie Heger*, 2014-TLC-1 (12 Nov 13)(employer did not establish that it was a separate business with distinct business needs because it had the same worksite address as another business, and both businesses sought certification for the same number of workers with the same qualifications to perform the same job duties); *Altendorf Transport, Inc.*, 2013-TLC-26 (28 Mar 13)(employer and another business were so intertwined that they functioned in concert to circumvent the requirements of the H-2A program because they shared the same owner, president, general manager, registered agent, and telephone number and performed the same type of farm work); *Lancaster Truck Line*, 2014-TLC-4 (26 Nov 13)(employer's attempt to divide work between separate legal entities does not demonstrate a temporary need because employer had a consistent need for workers year-round, although the job duties changed by season); *Larry Ulmer*, 2015-TLC-3, slip op 3 (business so intertwined they function as one); *Cressler Ranch Trucking, LLC*, 2013-TLC-7 (denial proper where applicant submitted applications from separate entities with consecutive dates of need, and applications listed address that represented same geographic location and same job duties in statement of temporary need).

¹⁹ See *Altendorf Transport*, slip op at 8.

determinative, and not all are required to find single employer status.²⁰ The four factors are (1) common ownership, (2) common management, (3) interrelated operations, and (4) centralized control of labor relations or personnel practices.²¹ Whether two entities should be treated as a single employer depends on all the circumstances of the case, and is characterized by the absence of an arm's length relationship between seemingly independent companies.²²

DISCUSSION

Initially, I must determine whether Employer has carried its burden to demonstrate that it and Intergrow Greenhouses, Inc are truly independent entities. Then, if I find the entities are not independent, I must aggregate their periods of need to determine whether that period is "temporary," as required for an employer to be able to use the H-2A program.

Single Employer Test

In order to determine whether Employer has shown that it and Intergrow Greenhouses, Inc are truly independent entities, I will examine whether the entities display (1) common ownership, (2) common management, (3) interrelated operations, and (4) centralized control of labor relations or personnel practices.

Common Ownership

The Amended Certificate of Incorporation for Ingergrow East is signed by Dirk Biemans, President.²³ The Certificate of Incorporations of Intergrow Greenhouses, Inc. is only signed by an Incorporator with Corporation Service Company.²⁴ Dirk Biemans is the elected Director of Intergrow Holding Company, Inc.²⁵ Dirk Biemans is listed as President, Mario van Logten as Secretary, John Vermeiren as Vice-President, and Dirk van den Plas as Treasurer in Employer's response to the NOD.²⁶ An organizational chart shows that Intergrow Holding is the parent company over both Intergrow Greenhouses and Intergrow East.²⁷ I find this factor weighs in favor of finding the two entities should be considered a singular employer for purposes of the H-2A program.

Common Management

Each entity has its own greenhouse manager, packhouse manager, greenhouse supervisor, facility manager, and administrative assistant. Both entities share accounting, sales, and HR managers and personnel. Dirk Biemans is responsible for securing insurance and payroll services. Dirk Biemans drives strategic planning, has the authority to submit applications for

²⁰ *Bolivar-Trees, Inc.*, 349 NLRB 720 (2007).

²¹ *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1141 (D.C. Cir. 2015).

²² *Id.*; *Bolivar-Trees*, at 720; *Dow Chemical Co.*, 326 NLRB 2888 (1998).

²³ AF 516.

²⁴ AF 525-526

²⁵ AF 531.

²⁶ AF 540.

²⁷ AF 533.

certification, and is president of both.²⁸ Funds from each entity are not intermingled and bills are paid separately. Common HR materials are used by both entities. Each entity has its own management team who hire and fire workers, direct and supervise the work, and plan labor. While the day-to-day operations are run by different management companies, I find this factor weighs in favor of considering the entities a singular employer as Dirk Biemans drives the strategic planning, HR materials are shared, and accounting, sales, and HR management and personnel are all common.

Interrelated Operations

Both entities grow varieties of tomatoes, though different varieties, with their own growing cycles, are grown at each location. Both entities share housing facilities, at least until Intergrow East secures the required local permits to construct housing facilities closer to the site. Products from both entities are sold under the Intergrow label. Employees have similar job duties at each site. Employees have been transferred and promoted from Intergrow Greenhouses to Intergrow East. The packing report email provided, purporting to highlight that Intergrow East's packing is tracked separately from Intergrow Greenhouses, in fact shows "East" is one of three "Sites" listed in the Pack Dashboard, along with "Albion" and "Filmore."²⁹ This seems to show that software designed for Intergrow Holdings, or Intergrow Greenhouses, has the ability to track all three sites.

While not identical, all the information provided shows the entities' operations are interrelated. This factor weighs in favor of considering the entities a singular employer for purposes of the H-2A program.

Centralized Control of Labor Relations or Personnel Practices

Each entity has its own management team that is responsible for labor planning, labor efficiency, hiring and firing employees, disciplinary actions, and scheduling. HR materials are shared, and accounting, sales, and HR management and personnel are all common. I find this factor to be in equipoise as to whether the entities should be considered a singular employer for purposes of the H-2A program.

In sum, of the four factors, I find the first three weigh in favor of viewing the two entities as a singular employer for purposes of the H-2A program, and the fourth is in equipoise. No single factor is determinative in and of itself. It does not appear that the two entities are truly independent and deal with each other only in an arms-length fashion. The organizational structure is most fairly viewed as one in which two divisions of a singular business enterprise produce a slightly different product. Since the preponderance of the evidence shows the entities are not separate and distinct entities, their periods of need should be aggregated to determine whether the employer's need is truly temporary.

²⁸ AF 541.

²⁹ AF 47. While the Administrative File copy is illegible, a legible copy is included in the case file I received.

Temporary Need

The relevant inquiry is not whether the job itself is temporary, but whether the employer has established that its *need* for labor is of a temporary or seasonal nature.³⁰ Employer's most current applications show periods of need that span an entire 2.5 years, with only a 20 day period where no temporary workers were requested. I find that Employer has not carried its burden to show its need for labor will last no longer than 1 year, and I find Employer has presented no extraordinary circumstances to extend that period of time.

ORDER

In light of the foregoing, I find that Employer has not carried its burden to show its labor needs are temporary, and the Certifying Officer's decision is **AFFIRMED**.

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge

³⁰ *Cressler Ranch Trucking LLC*, 2013-TLC-7 (26 Nov 12).